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Supreme Court, U.S.
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No. 92-944

In The

Supreme Court of the United States

October Term, 1992

M. WILEY CATLETT,

Petitioner,

vs.

JOHNNY W. RICHARDS, II, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Due Date: January 4, 1993

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QUESTIONS PRESENTED

1. Whether Petitioner has presented and preserved a substantial federal question in the state courts prior to submission of the instant Petition for Writ of Certiorari?

2. Whether there is any personal jurisdiction of Respondent, Hon. Robert M. Burnett?

LIST OF PARTIES

PETITIONER:

M. Wiley Catlett

RESPONDENTS:

Johnny W. Richards, II, Florence Iona Catlett, and the Hon. Robert M. Burnett, Judge of Probate Court No. 1 of Tarrant County, Texas

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent Hon. Robert M. Burnett, Judge of Probate Court No. 1 of Tarrant County, Texas, respectfully requests that the Court deny the instant Petition for Writ of Certiorari, which seeks to review the decision of the Court of Appeals for the Second Court of Appeals District of Texas, dismissing the purported appeal of

Petitioner. This opinion is not reported, but a copy of this Order is reproduced as Appendix "E" of the Petition.

JURISDICTION

Respondent challenges the jurisdictional basis upon which Petitioner seeks Writ of Certiorari, 28 U.S.C. §1257(a), because no substantial federal question is presented. This statute requires that Petitioner show a substantial federal question is presented in conformity with state procedural rules which the state has a substantial interest in enforcing. *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). This is essential to Supreme Court jurisdiction. *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). Petitioner has wholly failed to preserve any substantial federal question in the state courts in accordance with the applicable state procedural rules.

No personal jurisdiction existed as to Respondent Burnett because Judge Burnett was never personally a party to the legal proceedings attempted to be appealed by Petitioner to the Texas Court of Appeals.[1] The dismissal of Petitioner's appeal as to Judge Burnett by the Court of Appeals was proper on due process grounds because Judge Burnett was not a "party" against whom

[1] Judge Burnett was the trial judge in the probate matter Petitioner was attempting to appeal. When he took his appeal in state court from the trial court's order, Petitioner simply added Judge Burnett's name to the caption and proceeded as though he were a party and the cause was an action for damages.

the Court of Appeals could exercise any personal jurisdiction. This independent ground for decision obviates the necessity of Supreme Court review. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983).

Respondent does not challenge the timeliness of the Petition.

STATEMENT OF THE CASE

This is an attempted appeal by Petitioner, acting pro se, from an Order of Probate Court No. 1 of Tarrant County, Texas closing the Estate of Ernest Luther Catlett. Petitioner, a purported "heir" of the estate, attempted to appeal this Order to the state Court of Appeals. When he did so he added the names of Respondent Burnett as well as those of other interested parties, and sought monetary damages against all of them.[2] The balance of the purported appeal dealt with prior Orders of the Court which were final and unappealable. See, for example: *Catlett v. Catlett*, 630 S.W.2d 478 (Tex. App. -Fort Worth 1982, writ ref'd n.r.e.).[3]

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[2] There is no such procedure for this sort of action in Texas under the Rules of Civil Procedure. The jurisdiction of the Court of Appeals applicable in this case is appellate only and the Court of Appeals lacked jurisdiction to grant Petitioner the relief sought. Art. 5, §6, Texas Constitution, §22.220, TEX. LOC. GOV'T CODE.

[3] Petitioner has also previously attempted to ventilate this seeming interminable dispute in this Court. See: 90-105, *Wiley Catlett v. John R. Lively*, et al., Petition for Writ of Certiorari denied October 1, 1990.

By Opinion and Judgment on Dismissal of Appeal, dated February 25, 1992, the Court of Appeals dismissed the appeal.

Petitioner's Application for Writ of Error was denied by the Supreme Court of Texas, by Order, dated June 24, 1992.[4] Petitioner's Motion for Rehearing was denied by Order, dated July 23, 1992.

REASONS FOR DENYING THE WRIT

A. THERE IS NO PERSONAL JURISDICTION OF RESPONDENT BURNETT

As noted above Judge Burnett was the trial judge who presided over the probate proceedings from which the Petitioner attempted the purported appeal. He was never personally a party to the litigation in question and there was no personal jurisdiction over him in either the Court of Appeals or the Supreme Court of Texas. In addition the Court of Appeals had no such original jurisdiction as to actions for damages.

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[4] Petitioner had failed to preserve any points for appeal to the Supreme Court of Texas in his Motion for Rehearing in the Court of Appeals except to object to the lower court's failure to consider two post judgment motions filed therein as a Motion for Rehearing. Respondent Burnett challenged the Supreme Court's jurisdiction because of (1) the lack of any personal jurisdiction as to Judge Burnett, (2) the failure of Petitioner to preserve the alleged errors in his Motion for Rehearing as required by the Texas Rules of Appellate Procedure, Rule 131(e), and (3) for his failure to invoke the court's jurisdiction under §22.001(a) and (d), TEX. LOC. GOV'T CODE.

B. FAILURE TO PRESERVE A SUBSTANTIAL FEDERAL QUESTION

None of the Points of Error presented by Petitioner to the Court of Appeals related to any denial of federally protected rights. Rather the Points of Error presented related to alleged errors in the conduct of the proceedings in the probate matter pending before Judge Burnett. For example, Petitioner contended that various orders entered in 1981 and 1982 of the probate court were void because of the lack of a proper legal description. These included orders in other cases and entered by other courts which are valid subsisting orders and have in some instances been affirmed on appeal. *See: Catlett v. Catlett, supra.* Other Points of Error assert abuse of discretion and reversible error as to actions taken in 1984-1986. These were final and appealable orders and are now barred by res judicata under Texas probate law because they finally disposed of a controverted question for which that particular part of the probate proceeding was brought even though not finally disposing of the entire probate proceeding. *Huston v. Federal Deposit Insurance Corporation,* 800 S.W.2d 845, 848 (Tex. 1990); *Jones v. Griege,* 803 S.W.2d 486, 487 (Tex. App.-Dallas 1991, no writ) (partial summary judgment is a final appealable order); *Bowen v. Hazel,* 723 S.W.2d 795, 797 (Tex. App.-Texarkana 1987, no writ) (order requiring executor to return certain sums of money to the estate is a final appealable order); *Estate of Wright,* 676 S.W.2d 161, 164 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.) (summary judgment determining decedent's heirs is a final appealable judgment). Probate appeals not timely taken are lost. Rule 41(a), TEX. R. CIV. PROC.

Had Petitioner desired to raise the issue of bias or prejudice of the trial court he could have raised this issue not only on appeal but also by a motion for recusal of the trial court during the course of the probate proceedings themselves. Petitioner has not done so. Rather now because he disagrees with the results in state court, Petitioner characterizes the proceeding as a denial of due process.

While there is apparently no precise method for raising and preserving a federal question in state court, mere references to "due process of law" or the "constitution and treaties" are insufficient. *Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914).

In order to invoke this Court's jurisdiction under 28 U.S.C. §1257(a), it is essential that such be raised, presented and preserved in a timely and proper manner at the appropriate points in the state court proceedings. *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). The Supreme Court has no jurisdiction to exercise its jurisdiction over state court judgments, unless a substantial federal question has been raised or decided in the state court below. *Whitney v. California*, 274 U.S. 357, 360 (1927); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983).

C. NO CONFLICT WITH EXISTING AUTHORITY

Petitioner has had his day in court and his state law claims are barred by res judicata and lack of personal jurisdiction of Respondent, Hon. Robert M. Burnett. Petitioner has shown no conflict with existing Supreme Court authorities or between the Circuit Courts as to any substantial federal question.

CONCLUSION

For the reasons heretofore stated and discussed it is respectfully submitted that no matter within the jurisdiction of this Court is presented and that Petitioner has failed to present and preserve any substantial federal question in the state courts. Neither has any such substantial federal question been decided in the state courts nor personal jurisdiction of Respondent, Hon. Robert M. Burnett been shown. Further, no significant constitutional issue of national import is presented by this Petition for Writ of Certiorari, and it should be denied.

Respectfully submitted,

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